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8 **UNITED STATES DISTRICT COURT**

9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10

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12 **THE LIONS CLUB OF ALBANY,**  
13 **CALIFORNIA, A Nonprofit Corporation,**

14 **Plaintiff,**

15 **v.**

16

17 **THE CITY OF ALBANY, a Charter City; and**  
18 **DOES 1 through 25;**

19 **Defendants.**

20

21 Case No. 3:22-cv-05377-WHO

22

23 **PLAINTIFF, LIONS CLUB OF**  
**ALBANY'S REPLY BRIEF IN SUPPORT**  
**OF MOTION FOR PRELIMINARY**  
**INJUNCTION**

24 Date: November 9, 2022

25 Time: 2:00 p.m.

26 Courtroom: Zoom Calendar

27 Judge: Hon. William H. Orrick

28 Trial Date: None Set

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## INTRODUCTION

The Lions Club of Albany, California constructed a steel and plexiglas lighted cross on Albany Hill on private property in 1971. (Berner Dec. ¶ 3) The Lions Club was granted an easement to maintain the Cross when the property was sold to a developer prior to being transferred to the City of Albany for a public park in 1973. (Berner Dec. ¶ 4) Lions members find religious comfort from the daily display of the Cross which can be seen from many areas in the Albany and Berkeley. (Pope Dec. ¶ 3, 4 and 5) The Cross is visible to thousands when lighted at night. Members of the community gather at the Cross, some on a daily basis, to pray, reflect, worship, read the bible, and spread the good word to others. (Pope Dec. ¶ 3, 8, 9) Every year since 1971 the Lions have illuminated the Cross prior to each Christmas and Easter in celebration of these religious occasions. (Berner Dec. ¶ 5; Pope Dec. ¶ 6) The Lions have established a long-standing community tradition of celebrating Easter Morning services at the Cross. (Berner Dec. ¶ 7) The Easter service attracts local residents who join in the celebration of this Christian holiday. (Pope Dec. ¶ 7)

In 2022, the City of Albany filed an eminent domain action and obtained a Prejudgment Order of Possession allowing the City to remove the Cross and thereby deprive the Lions of their above described First Amendment rights of Free Exercise of Religion and Freedom of Speech. (Nichols Dec. Exhibit 3 and 4) The City asserts it is exercising eminent domain to address an Establishment Clause problem. (Nichols Dec. Exhibit 1) There is an alternative to condemnation that will resolve the City's perceived Establishment Clause concerns and does not require removal of the Cross - selling a parcel containing the cross to a private party. *Lions Club of Albany v. City of Albany*, 323 F. Supp. 3d 1104, 1113 and 1117 (N.D. Cal. 2018) This problem was faced by the City of San Francisco and the City of San Diego who both agreed to sell the property upon which their Crosses were standing to private parties. (Nichols Dec. Exhibit 2) The Lions Club offered to purchase the property the Cross on, but the City, acting out of long-standing atheist / anti-Christian prejudice and bias has chosen to condemn and remove the Cross.

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## ARGUMENT

## I. The Lions Club is Likely to Succeed on the Merits

**A. The City is Acting with Bias and Prejudice Against the Cross in Condemning the Lions' Easement and Removal of the Cross.**

### **1. The Disconnection of Electrical Utility Service**

The City of Albany has a seven-year history of abusing its authority in an effort to remove the Cross on Albany Hill. In November 2015, the City received complaints from an atheist group, claiming the Cross was (1) structurally deficient and (2) an electrical utility line was unsafe. The City conducted an investigation and found the Cross structurally sound. However, the City expressed concerns regarding an electrical utility line passing through the branches of a tree. Despite the fact that the utility (PG&E) owned, maintained and was responsible for the line as well as vegetation management of the plants surrounding the line<sup>1</sup>, the City demanded the Lions Club disconnected electrical service. The Lions did not. (2<sup>nd</sup> Nichols Dec. Exhibit 8) The City next demanded the Lions install an intermediate utility pole to carry the wire, promising approval for the pole would be given the same day. In an effort to placate the City, Lions obtained a contractor and prepared specifications for the City's approval. After presenting plans and specifications the City refused to issue a permit for the pole without City Council approval. (2<sup>nd</sup> Nichols Dec. Exhibit 9) The Lions responded that PG&E was responsible for the utility line. The Lions also pointed out that utility lines pass through trees at numerous locations throughout the City. The Lions expressed concern that the City had singled out the Cross because it is a religious symbol and asked the City to identify other instances of utility wire enforcement undertaken by the City. (2<sup>nd</sup> Nichols Dec. Exhibit 10) The City did not respond to this December 10, 2015 letter.

Next, on February 1, 2016, the City Council met to discuss and take possible action regarding the “Lions Cross on Albany Hill.” The council unanimously expressed the desire that the Cross be removed. A few days later two councilmembers visited the regular Lions Club meeting and expressed the Council’s dissatisfaction with the Cross because it was a religious

<sup>1</sup> California Public Utilities Commission General Order 95, Section III Rule 35 places the responsibility for “vegetation Management” on PG&E. Furthermore, CPUC Electric Rule No 16(A)(3) also provides that the ownership of line installed for the purpose of delivery of electric energy belongs to PG&E.

1 symbol and wanted the Cross removed and the Lions easement relinquished to the city. (Nichols  
 2 ¶ 3, 4, and 5.) On April 4, 2016, the City forwarded a “Confidential Settlement Communication”  
 3 offering to construct a bench in the park in exchange for the Lions removal of the Cross and  
 4 relinquishing the easement. (2<sup>nd</sup> Nichols Dec. Exhibit 11)

5 On August 24, 2016, over eight months after the December 10, 2015, letter with no  
 6 indication of any electrical problem in the interim, the City sent the Lions a letter stating they were  
 7 working with PG&E to disconnect power to the cross. (2<sup>nd</sup> Nichols Dec Exhibit 12) September 1,  
 8 2016, without any notice, hearing or other due process the City instructed PG&E to disconnect the  
 9 utility service. (2<sup>nd</sup> Nichols Dec. Exhibit 13) Despite the fact that the Lions were not responsible  
 10 for the electrical utility line, the City refused to reestablish utility service to the Cross for 106 days.  
 11 Finally, on December 14, 2016, after the City Fire Chief spoke with the attorney for PG&E the  
 12 City acknowledged the utility, not the Lions Club was responsible for the utility line, and  
 13 authorized the restoration of electrical service to the Cross. (2<sup>nd</sup> Nichols Dec. Exhibit 14)

14 ***2. The First Federal Law Suit***

15 The Lions Club subsequently filed suit against the City pursuant to 42 USC §1983 alleging  
 16 violation of Due Process, Equal Protection, Free Speech and Free Exercise of Religion. The City  
 17 chose to attack the Lions easement and Cross by filing a counterclaim for Quiet Title seeking to  
 18 terminate the Lions easement to maintain the Cross. These claims were dismissed on summary  
 19 judgment. The Court found the Lion’s easement valid and declared in *dicta* that the City must  
 20 remedy its First Amendment Violation but stated that the Court could not compel the City to do so  
 21 because no plaintiff with standing had intervened in the case. The Court stated, in *dicta*, that the  
 22 City had “at least two options either sell a parcel containing the cross to a private party or condemn  
 23 the easement through its power of eminent domain.” *Lions Club of Albany v. City of Albany*, 323  
 24 F. Supp. 3d 1104, 1117 (N.D. Cal. 2018) The District Court was sustained by the 9<sup>th</sup> Circuit Court  
 25 of Appeal. The Lions’ claims against the City were resolved by a \$125,000.00 payment to the  
 26 Lions Club.

27 City Council members have made statements prior disconnecting electrical service, during  
 28 the pendency of the first law suit and subsequent to the conclusion of that law suit evidencing the

1 City's dislike for and desire to remove the Cross. (Nichols Dec. ¶ 3, 4, 5, 6, 7, 8 and 9).

2                   ***3. Eminent Domain - the Resolution of Necessity***

3                   The first step in the eminent domain process is the adoption of a valid Resolution of  
 4 Necessity. The power of eminent domain may be exercised to acquire property for a proposed  
 5 project ***only if all of the following are established:*** (a) The public interest and necessity require  
 6 the project; (b) The project is planned or located in the manner that will be most compatible with  
 7 the greatest public good and the least private injury; and (c) The property sought to be acquired is  
 8 necessary for the project. California Code of Civil Procedure §§1240.030 and 1245.245(a)(3)  
 9 [emphasis added].

10                  In their March 23, 2022 letter to the City, the Lions Club offered to purchase the lots on  
 11 which the Cross stands. The Cross would then stand on private property eliminating any perceived  
 12 Establish Clause problem. (Nichols Dec. Exhibit 2) The City rejected this offer and unanimously  
 13 approved a Resolution of Necessity to condemn the Lions Club's easement and the Cross, thus  
 14 depriving the Lions Club of its First Amendment rights – Free Exercise of Religion and Freedom  
 15 of Speech.

16                  In, the Resolution of Necessity the City did not describe a “project.” The word “project”  
 17 appears in the Resolution seven times: the first four mentions are contained in Section 2 where the  
 18 City asserts that the “project” is not subject to CEQA; and the final three mentions appear in  
 19 Section 6 where the City recites in a conclusionary, non-factual manner the required statutory  
 20 findings. (Nichols Exhibit 1) The City did not establish actual findings justifying the taking.

21                  The City also asserts that it is exercising eminent domain to “provide an unencumbered park  
 22 to its residents.” The phrase “unencumbered park” is an enthusiasm for “remove the Cross.” The  
 23 City’s declaration by Jeff Bond lists a plethora of plants and animals that visit or inhabit the Park  
 24 but it fails to state how the Cross harms, damages or interferes with plant, wildlife or public use of  
 25 the park. The Cross stand on the eastern side of the park near the edge of a steep slope away from  
 26 the trail and does not impede pedestrians walking through the park or interfere with wildlife. The  
 27 Cross and the concrete footing for the Cross occupy less than 50 square feet of the park. (Berner  
 28 Dec. ¶ 9 and 10) The alleged justification of providing an “unencumbered park” is a sham - it does

1 not establish necessity for the project, or outweigh the significant injury the Lions Club's First  
 2 Amendment rights will suffer, or establish that the Lions easement and Cross are necessary for any  
 3 alleged project. None-the-less City Council adopted the Resolution of Necessity without any  
 4 questions, comments or discussion by the Councilmembers. Berner Dec ¶ 12. The City's flimsy  
 5 justification for the condemn of the Cross substantiates the City's anti-Christian prejudice and bias  
 6 against the Cross.

7 ***4. Eminent Domain – Motion for Prejudgment Possession***

8 Following the passage of the Resolution of Necessity the City promptly filed an action in  
 9 eminent domain. The City filed its eminent domain action on May 4, 2022. Two days later, with  
 10 shocking speed, the City filed a motion for prejudgment possession – even though it had no  
 11 “project” to build. Further evidencing the City prejudice and bias the City seeks to remove the  
 12 Cross as quickly as possible without regard to the First Amendment injuries that will be suffered  
 13 by the Lions Club.

14 Incredibly the City has asserted that its sham Resolution of Necessity conclusively  
 15 established the “public interest and necessity,” “compatibility with the greatest public good and  
 16 the least private injury,” and that “the property is necessary for the project” as required by  
 17 California Code of Civil Procedure § 1240.030. The Lions Club filed an Answer challenging the  
 18 City’s the City’s “right to take” and asserted ten meritorious affirmative defenses. Pursuant to  
 19 California Code of Civil Procedure §§ 1250.350 and 1250.360. No trial date has yet been set  
 20 none-the-less the City has pushed forward with its motion for prejudgment possession. Contrary  
 21 to the City’s assertions the Resolution of does not have a conclusive effect if its adoption or  
 22 contents were influenced or affected by gross abuse of discretion by the governing body. California  
 23 Code of Civil Procedure § 1245.255(b). A gross abuse of discretion may be established by  
 24 showing that adoption of a resolution of necessity by the governing board of a public entity was  
 25 arbitrary, capricious, or entirely lacking in evidentiary support, the governing body failed to follow  
 26 the mandated procedure, or the governing body was irrevocably committed to taking the property  
 27 regardless of the evidence presented at the resolution of necessity hearing. *Council of San Benito*  
*County Governments v. Hollister Inn, Inc.*, 209 Cal.App.4th 473, 485 (2013); *Burbank-Glendale-*

1      *Pasadena Airport Authority v. Hensler*, 233 Cal.App.3d 577, 589 (Cal. Ct. App. 1991)

2            The totality of the City's actions since 2015- its repeated and unrelenting attacks on the  
 3 Lions easement, and its current attempt to condemn the Cross proves the City has not acted  
 4 neutrally – it has favored atheists and/or non-Christian religions in violation of the Lions Club's  
 5 First and Fourteenth Amendment rights.

6            **B. Taking the Lions Easement and Removal of the Cross Burdens, Interferes with,  
 7 Deprives and Violates the Lions Club's First Amendment Rights**

8            The Free Exercise and Free Speech Clauses of the First Amendment work in tandem. Where  
 9 the Free Exercise Clause protects religious exercises, whether communicative or not, the Free  
 10 Speech Clause provides overlapping protection for expressive religious activities. *Kennedy v.  
 11 Bremerton Sch. Dist.*, 597 U.S. \_\_\_\_ (2022). The Lions display of the Cross is a symbolic  
 12 communication to the community conveying God's presence and providing religious comfort and  
 13 enjoyment in its daily display to the community. The Cross can be seen from many areas in the  
 14 Albany and Berkeley communities and is particularly visible when lighted at night. Members of the  
 15 Lions Club find it religiously rewarding and satisfying when told by individuals in the community  
 16 about joy and comfort they receive from seeing the Cross on the hill each day. (Pope Dec. ¶ 3, 4,  
 17 5) The lighting of the Cross at Christmas and Easter are recognized religious traditions during those  
 18 holidays. (Pope Dec. ¶ 6) The Cross is also a location and gathering place for religious worship  
 19 where people in the community come to pray, reflect, talk and spread the good word to others.  
 20 (Pope Dec. ¶ 7, 8, and 9) For over 50 years the Lions have continued the tradition of Easter Morning  
 21 services at the Cross. These activities are pure forms of religious expression and free speech.

22            The City asserts taking possession of the Lions' easement and removing the Cross is not a  
 23 violation of the Lions First Amendment Right of Free Exercise of Religion because the City 's  
 24 actions do not prevent individuals from gathering at Albany Hill Park for Easter morning services,  
 25 to pray, to worship and to participate in religious activities. (City Opposition p. 18:12-19)

26            However, Supreme Court decisions do not support the City's position. The "exercise of  
 27 religion" often involves not only belief and profession but the performance of (or abstention from)  
 28 physical acts: assembling with others for a worship service, participating in sacramental use of

1 bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.  
 2 *Employment Div. v. Smith*, 494 U.S. 872 (1990) Similarly, remote viewing or other alternatives  
 3 are not the same as personal attendance. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.  
 4 Ct. 63, 67 (2020) [Citing *Elrod v. Burns* , 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)  
 5 (plurality opinion).] The City does not justify why depriving the Lions of the ability to display the  
 6 Cross daily and light the Cross at holidays are not violations of the Free Exercise of Religion and  
 7 Freedom of Speech.

8                   **C. The City Has No Compelling Interest Justifying Condemning the**  
 9                   **Lions Easement or Removing the Cross**

10                  Courts must apply strict scrutiny when the government “proceeds in a manner intolerant of  
  11 religious beliefs or otherwise restricts practices because of their religious nature.” *Fulton v. City of*  
  12 *Philadelphia*, 141 S. Ct. 1868, 1877 (2021) see also *Church of the Lukumi Babalu Aye, Inc. v. City*  
  13 *of Hialeah*, 508 U.S. 520, 534 (1993). The City’s actions described in detail above establish a clear  
  14 intolerance toward the Cross. In situations where there are "individualized governmental  
  15 assessment[s]" strict scrutiny is also appropriate. *Cottonwood Christian Center v. Cypress*  
  16 *Redevelopment Agency*, 218 F. Supp. 2d 1203 1223 (C.D. Cal. 2002)[ Citing *Employment Div. v.*  
  17 *Smith*, 494 U.S. 872, 884 (1990)]

18                  In applying strict scrutiny, the City’s action can stand only if it advances compelling state  
  19 interests “of the highest order” *and* is “narrowly tailored in pursuit of those interests. *Lukumi, supra*,

20 508 U.S. at 546. The City asserts that it seeks to acquire the Lions easement in order to  
  21 “unencumber public land and avoid any potential violation of the Establishment Clause arising from  
  22 Defendant’s display of a cross in the park.” (City Opposition to Motion for Preliminary Injunction  
  23 p17:19-18:11)

24                  The City fails to explain how “unencumbering the public land” is a compelling state interest.  
  25 The City currently has a park which has existed for almost 50 years. The Cross does not interfere  
  26 with the plant life, wildlife or park patrons.

27                  The City next asserts that it wishes to avoid any potential violation of the Establishment  
  28 Clause. In this regard the City’s actions are not narrowly tailored in pursuit of this interest. The

1 City has opted for a course of action that will burden, interfere and terminate the Lions' First  
 2 Amendment rights of Free Exercise of Religion and Free Speech. The City can more effectively  
 3 address its Establishment Clause problem by exercising the second option of selling a lot of land  
 4 upon which the Cross stands to a private party. The Lions have already offered to purchase the  
 5 property. The sale of the property completely eliminates the claimed Establishment Clause problem  
 6 and does not burden, interfere or hinder the Lions Club's First Amendment rights.

7 The City's action of condemning the Lions easement and Cross is not narrowly tailored and  
 8 cannot withstand the strict scrutiny analysis.

9 In light of the foregoing, the Plaintiff is likely to succeed on the merits of this case.

10 **II. The Lions will Suffer Irreparable Harm Unless this Court Intervenes**

11 **A. The Loss of First Amendment Freedoms Constitute Irreparable Injury**

12 "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably  
 13 constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67  
 14 (2020) [ Citing *Elrod v. Burns* , 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality  
 15 opinion). "When an alleged deprivation of a constitutional right is involved, most courts hold that  
 16 no further showing of irreparable injury is necessary." *Hartford Courant Co. v. Carroll*, 986 F.3d  
 17 211, 224 (2d Cir. 2021) (quoting *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984)).

18 **B. The Lions will Suffer Irreparable Injury Both Short Term and Permanently**

19 The Lions display of the Cross is a symbolic communication to the community conveying  
 20 God's presence and comfort to many in the community. The Lions maintain the Cross as an  
 21 exercise of religious expression by providing members of the community the opportunity see and  
 22 visit the Cross, receive its message, engage in prayer, receive comfort, hope, inspiration, gather in  
 23 fellowship and rejoice in God. The Lions have also exercised their religious beliefs by lighting and  
 24 displaying the Cross during the Christmas and Easter seasons and hosting Easter morning services  
 25 for more than fifty years. Upon removal of the Cross the Lions will immediately be deprived of  
 26 these forms of religious speech and religious expression.

27 The City argues that the Lions will not suffer irreparable harm because the Cross will be  
 28 taken down and preserved pursuant to the Superior Court's Order. (City Opposition Brief p 19:3-

1       9) The City ignores the obvious reality that the Lions will be unable to engage in any of the above-  
 2 described First Amendment activities once the Cross has been removed regardless of whether the  
 3 removal is ultimately permanent or temporary. In essence the City has figuratively placed a gun  
 4 at the head of the Lions Club, either give up the rights to contest the City's sham Resolution of  
 5 Necessity and right to take, or be deprived of the rights of free speech and free exercise of religion  
 6 pending that determination.

7              Temporary removal of the Cross will also harm long-established religious traditions  
 8 which, once interrupted, frequently cannot be easily reinstated. (Berner Dec. ¶ 16 and 17)  
 9 Furthermore, some Lions and community members believe the removal of the Cross is a  
 10 desecration of the sacred symbol. The spiritual enjoyment they receive will be forever tarnished  
 11 by its removal regardless of whether it is reconstructed in place or at a different location. (Pope  
 12 Dec. ¶12)

13              In view of the forgoing the Lions will suffer irreparable harm from the removal of the  
 14 Cross.

15              **III. The Balance of Equities and the Public Interest Favor Protecting the Lions' First  
 16 Amendment Rights**

17              **A. Balance of Equities and Hardships**

18              In the present case the Lions will suffer the loss of their beloved Cross which they  
 19 constructed and have maintained for over 50 years. The Lions take pride in displaying the Cross,  
 20 a religious symbol that conveys familiar Christian customs and sentiments to the community. The  
 21 Cross symbolically conveys different religious meanings to different people including messages  
 22 of love, hope, comfort, salvation, healing, remembrance, righteousness, and one's personal  
 23 relationship with God. The Cross is also a point where the community may focus their religious  
 24 thoughts through prayer, meditation, associating with others. At Christmas and Easter, the lighted  
 25 Cross is a reinforcement of Christian teachings, and a seasonal reminder of these special and  
 26 significant holidays. In this action the Lions are merely seeking to maintain the status quo.

27              The City on the other hand seeks to remove the Cross because it accepted the lots upon  
 28 which the Cross stands subject to a Lions Club easement to maintain the Cross. The City has been

1 aware of a potential Establishment Clause problem resulting from its actions. The City now  
 2 speculates it might be sued based upon its Establishment Clause problem, even though the Cross  
 3 has existed for 50 years without any such litigation.

4 The City can easily resolve its perceived Establishment Clause problem by selling its  
 5 underlying fee interest to a private party and permanently. This simple solution resolves the  
 6 problem the City itself created and allows the Lions to exercise its Constitutional rights. The City  
 7 prefers to cater to atheist and anti-Christian bias. The Lions will suffer the significant loss of their  
 8 First Amendment rights and are currently seeking only to maintain the status quo.

9 **B. Public Interest**

10 In this matter the public interest favors a preliminary injunction. “Courts considering  
 11 requests for preliminary injunctions have consistently recognized the significant public interest in  
 12 upholding First Amendment principles.” *Sammartano v. First Judicial District Court*, 303 F.3d  
 13 959, 974 (9th Cir. 2002). The government does not have an interest in the enforcement of an  
 14 unconstitutional law. *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)  
 15 Similarly, the City does not have a legitimate interest in enforcing an action which unnecessarily  
 16 deprives a party of its First Amendment rights, particularly when a neutral alternative is available.

17 **IV. The Lions Club Has Standing to Bring This Action**

18 Federal standing consists of three elements. First, the plaintiff must have suffered an  
 19 “injury in fact”- an invasion of a legally-protected interest which is (a) concrete and particularized  
 20 and (b) “actual or imminent, not conjectural or hypothetical. Second, there must be a causal  
 21 connection between the injury and the conduct complained of -the injury has to be “fairly traceable  
 22 to the challenged action of the defendant, and not the result of independent action or some third  
 23 party not before the court. Third it must be “likely,” as opposed to merely “speculative” that the  
 24 injury will be “redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-  
 25 561 (1992).

26 The Lions Club’s standing to bring this action is alleged in the complaint.

27 ***The “legally -protected interest.*** The Lions Club is a nonprofit corporation. (Comp ¶ 1)  
 28 In 1971 the Lions constructed the Cross on private property on Albany Hill and subsequently

1 received an easement for ingress, egress and to maintain the Cross. (Complaint ¶ 6 and 16 and  
 2 Nichols Dec. Exhibit 1 page 12) The Cross is a religious symbol that conveys a Christian message  
 3 throughout the community as well as a point or location for religious worship, and ceremonies.  
 4 (Complaint. ¶ 8, 9, 10, 11, 12, 13, 14, and 24)

5       ***Injury in fact.*** The City of Albany City enacted a Resolution of Necessity condemning the  
 6 Lion's easement and the Cross without regard to the Lions rights of free speech and free exercise  
 7 of religion. (Comp. ¶ 47, 48, 49, 50, 51 and 52 and see Nichols Dec. Exhibit 1) The City filed an  
 8 action in eminent domain in state court seeking to acquire the easement and remove the Cross.  
 9 Two days later the City filed a motion for Prejudgment Possession without regard to the Lions  
 10 First Amendment rights. Pursuant to the City's request, the Superior Court of California granted  
 11 Pretrial Possession of the Lion's easement but briefly delayed the removal of the Cross without  
 12 regard to the Lions First Amendment Rights. (Comp. ¶ 58, 59, 61 see Nichols Dec. Exhibits 3, 4  
 13 and 7)

14           The City has now taken possession of the Lion's easement pursuant to the Court's  
 15 Order and the removal of the Cross is imminent and not conjectural or hypothetical. The City is  
 16 also attempting to permanently acquire the Lions easement and deprive the Lions of their Cross at  
 17 its present location.

18       ***The City's Conduct.*** The City acting under color of law adopted a Resolution of Necessity,  
 19 filed an eminent domain action, filed a motion for Prejudgment Possession, took possession of the  
 20 Lion's easement, and the removal of the Cross is imminent all without regard to and placing a  
 21 burden on the Lions free exercise of religion and free speech (Comp ¶ 50, 63, 64, 65, 66, 74, 75,  
 22 76, 77, 79, 80, 81, 82, and 83) The City has also acted with bias, prejudice showing a preference  
 23 for atheism and non-Christian religions in violation of the Establishment Clause and the Equal  
 24 Protection Clause of the Fourteenth Amendment. (Comp. ¶ 105, 23, 24, 25, 26, 27, 28, 29, 30, 31,  
 25 32, 33, 34, 36, 37, 41, 42, 46, 47, 49, 50, 52, 53, 54, 56 and 57).

26           These paragraphs establish that there is a direct link between the Lions injury and pending  
 27 injury and the City's conduct. Finally, this law suit seeks to prevent further injury by enjoining  
 28

1 removal of the Cross. There is abundant evidence establishing the Lions standing to prosecute this  
 2 action in this Court.

3 **V. Abstention is Not Appropriate.**

4 **A. The Pullman Abstention Doctrine**

5 The doctrine of abstention, under which a District Court may decline to exercise or  
 6 postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a  
 7 District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide  
 8 cases can be justified under this [the Pullman] doctrine only in the exceptional circumstances  
 9 where the order to the parties to repair to the state court would clearly serve an important  
 10 countervailing interest. *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 188-189 (1959).  
 11 "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's  
 12 choice of a federal forum for the hearing and decision of his federal constitutional claims. escape  
 13 from that duty is not permissible merely because state courts also have the solemn responsibility,  
 14 equally with the federal courts, ‘ . . . to guard, enforce, and protect every right granted or secured  
 15 by the Constitution of the United States . . . ,’ " *Zwickler v. Koota*, 389 U.S. 241, 248 (1967) [Citing  
 16 *Robb v. Connolly*, 111 U.S. 624, 637]

17 *Pullman* abstention is appropriate when (1) the case touches on a sensitive area of social  
 18 policy upon which the federal courts ought not enter unless no alternative to its adjudication is  
 19 open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue  
 20 would terminate the controversy, and (3) the possible determinative issue of state law is uncertain.  
 21 *Confederated Salish v. Simonich*, 29 F.3d 1398, 1407 (9th Cir. 1994) [Citations omitted]

22 In First Amendment cases, the first Pullman factor "will almost never be present because  
 23 the guarantee of free expression is always an area of particular federal concern. "Indeed,  
 24 constitutional challenges based on the first amendment right of free expression are the kind of  
 25 cases that the federal courts are particularly well suited to hear. That is why abstention is generally  
 26 inappropriate when first amendment rights are at stake." *Porter v. Jones*, 319 F.3d 483, 492 (9<sup>th</sup>  
 27 Cir. 2003) [ Citing U. S. *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989) and *J-R*  
 28

1     *Distrib., Inc. v.Eikenberry*, 725 F.2d 482, 487 (9th Cir. 1984), overruled on other grounds by  
 2     *Brockett v. Spokane Arcades, Inc.*, 472.]

3                 The present case involves the interference, burden and impending deprivation of the Lions  
 4     Club's First Amendment rights of Free Exercise of Religion and Free Speech which are  
 5     particularly appropriate for resolution in Federal Court. The matter also involves violation of the  
 6     Fourteenth Amendment Due Process and discriminatory prejudice and bias by the City.

7                 **B. Colorado River Abstention**

8                 The exercise of abstention under the Colorado River doctrine is clearly inappropriate. The  
 9     *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800 (1976) case involved conflicting claims  
 10    to the allocation of Colorado River water which was divided into seven water divisions, in which  
 11    each division had an established procedure for the settlement of water claims on a continuous  
 12    basis. The rights were claimed by certain Indian tribes as well as rights based on state law, and  
 13    non-Indian water rights in three other state water divisions. Thus, the Colorado River case involves  
 14    unique and complex issues involving multiple parties.

15                 In the present case the state and Federal cases address two distinct and separate matters.  
 16    The state case addresses simply eminent domain and as the City repeatedly points out its authority  
 17    to exercise is based upon a Resolution of Necessity that "conclusively establishes" that authority.  
 18    (Defs. Opposition 9:6-16) See also California Code of Civil Procedure §§1240.030 and 1255.410.  
 19    This case addresses the burdening, interference with and impending deprivation of the Lions First  
 20    Amendment rights.

21                 The state proceedings will not adequately protect the Lions rights. The City ignores the  
 22    fact that it has already obtained possession of the Lions easement and that removal of the Cross and  
 23    the concomitant deprivation of First Amendment rights is eminent. The City argues that the Lions  
 24    may challenge the taking in the state action when the matter comes to trial (sometime in the next  
 25    five years); ignoring the fact that the Lions will be deprived of their First Amendment rights in the  
 26    interim.

27                 The City argues that it is entitled to a stay of this action because it filed its action first.  
 28    However, as the City noted in its standing argument above, the Lions did not have standing to

1 bring this action until they suffered an “injury in fact”- an invasion of a legally-protected interest  
 2 which is (a) concrete and particularized and (b) “actual or imminent, not conjectural or  
 3 hypothetical. Consequently, the Lions have brought this action to protect their rights only when  
 4 the legal authority to do so arose.

5 In consideration of the above, abstention under the Colorado River Doctrine is not  
 6 appropriate in this case.

## 7 CONCLUSION

8 Plaintiff, the Lion Club is likely to succeed on the merits of this matter because the City is  
 9 burdening, interfering with and will very soon deprive the Lions of their First Amendment rights  
 10 to Free Exercise of Religion and Free Speech. In reaching the decision to exercise eminent domain,  
 11 the City failed to act fairly but rather imposed a long standing bias, prejudice, and dislike against  
 12 the Christian Cross and favored atheist and non-Christian religions. Defendant’s bias and  
 13 prejudice violate the Fourteenth Amendment. Unless enjoined by this Court, the Lions will suffer  
 14 irreparable harm. The Lions will be deprived of their right to symbolically communicate with the  
 15 community by displaying the Cross on a daily basis. The Lions will be deprived of the ability to  
 16 light the Cross for Christmas and Easter. The long-established practice of Easter Services at the  
 17 Cross will be terminated, perhaps permanently. The Lions and will no longer be able to share the  
 18 Cross with the community as a point of prayer, reflection and religious worship.

19 The taking of the Lions easement and removal of the Cross does not meet the requirements  
 20 of strict scrutiny because the City’s justification for its eminent domain action is an Establishment  
 21 Clause problem. The removal of the Cross is not necessary to resolve the problem. The City may  
 22 simply sell the property to a private party and forever resolve the matter. Consequently, the City  
 23 has failed to present a compelling state interest that is narrowly tailored to avoid injury to the Lions  
 24 rights.

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1 An injunction is appropriate because the Lions will suffer irreparable harm from the City's  
2 action and the balancing of harms and equities as well as the public interest favor the issuance of  
3 a preliminary injunction.

4  
5 Dated: October 14, 2022

Respectfully submitted

6  
7 /S/ Robert E. Nichols

8 \_\_\_\_\_  
9 Robert E. Nichols  
Attorney for Plaintiff  
Lions Club of Albany, California

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## **CERTIFICATE OF SERVICE**

I am a resident of the State of California, over the age of eighteen years and not a party to the within action. My business is 713 Key Route Blvd., Albany, California. I served the following documents:

- **PLAINTIFF, LIONS CLUB OF ALBANY'S REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
  - **SECOND DECLARATION OF ROBERT E. NICHOLS IN SUPPORT OF PRELIMINARY INJUNCTION.**

by electronically serving the documents(s) described above via United States District Court Electronic Case Filing website (CM/ECF notification system on the recipients designated on the electronic service list that is located on the Pacer website and by Electronically sending a true and correct copy thereof on: [scott.ditfurth@bbklaw.com](mailto:scott.ditfurth@bbklaw.com)

I declare under the penalty of perjury under the laws of the State of California and the laws of the United States that the above is true and correct and that this declaration was executed on October 14, 2022, at Albany, California.

/S/ Robert E. Nichols

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Robert E. Nichols